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No. 03-1136

Supreme Court, U.S.
FILED
MAR 10 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL SLUSARCHUK, and ELAINE STEBLETON, Individually and as trustee on behalf of the heirs and next of kin of Jennifer Stebleton, deceased,

Petitioners,

v.

JOHN HOFF, individually and in his official capacity as Minneapolis Police Officer, LANCE FAUST, individually and in his official capacity as Minneapolis Police Officer,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
Respondents' Reasons for Denying the Writ	2
A. Petitioners' claim that a "deliberate indifference" standard should apply in police pursuits is in direct violation of the test articulated by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)	3
B. Petitioners fail to identify any conflict among the lower courts on the same matter that would justify the granting of the Petition	5
Conclusion	11

TABLE OF AUTHORITIES

Page

FEDERAL DECISIONS

Checki v. Webb, 785 F.2d 534 (5th Cir. 1986) 9

County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708 (1998) ..... *passim*

Davis v. Township of Hillside, 190 F.3d 167 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000) 6, 7, 8, 9, 10

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) 8

Fagin v. Vineland, 22 F.3d 1296 (3rd Cir. 1994) 8

Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001) 6, 7, 10

Onossian v. Block, 175 F.3d 1169 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999) 6, 7

Slusarchuk v. Hoff, 346 F.3d 1178 (8th Cir. 2003) 4, 5

Temkin v. Fredrick County Commissioners, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) 8

Trigalet v. City of Tulsa, 239 F.3d 1150 (10th Cir. 2001) 5

Williams v. Denver City, 99 F.3d 1009 (10th Cir. 1996) 8

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 2, 4

STATEMENT OF THE CASE

At 11:30 p.m. on August 22, 2000, Minneapolis Police Officers Jon Hoff and Lance Faust were on duty when they became suspicious of a car lingering at an intersection. The officers were a half block away when they first observed the stationary vehicle stopped at an intersection controlled by four-way stop signs. As the officers approached the intersection, the vehicle remained stationary. After the officers reached the intersection, they stopped and waited for the motor vehicle to move. Because the vehicle did not move, Faust became suspicious and wondered if the driver was possibly under the influence of alcohol or had a medical problem.

The officers then made a turn and shined an alley light into the vehicle. Faust recognized the driver, Rico Howard. Hoff thought that he recalled an outstanding probable cause pickup on a man named Howard. The officers followed Howard briefly and then activated their squad car's emergency lights. Howard initially slowed and pulled over to the curb but then drove through a stop sign and continued on at approximately 10 to 20 miles per hour. Howard did not stop, but, instead, drove through two more stop signs and then accelerated with the police in pursuit. The two vehicles reached the speed of approximately 50-60 miles per hour with the squad car behind Howard's vehicle. Within two blocks, Howard went through another stop sign and collided with a car in which Jennifer Stebleton and Michael Slusarchuk were riding. Stebleton was killed instantly. Slusarchuk suffered severe injuries and remains partially paralyzed.

Howard was arrested at the scene. On December 4, 2001, the Minnesota state district court conducted a

pretrial hearing regarding the criminal charges filed against Howard in order to make a pretrial determination of the validity of the stop. The state district court found that the officers had an articulable reasonable suspicion to perform an investigatory stop of Howard. Subsequently, Howard pled guilty to murder in the second degree and to fleeing a police officer in a motor vehicle resulting in great bodily harm.

Slusarchuk and Stebleton's heirs then commenced this action under 42 U.S.C. § 1983. Respondent officers argued in United States District Court that they are entitled to qualified immunity under *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998), a police pursuit case in which this Court articulated the applicable substantive due process standard. The District Court denied the officers' motion. Respondent officers appealed the District Court's decision. The United States Court of Appeals for the Eighth Circuit reversed the District Court and held that Officers Hoff and Faust are entitled to qualified immunity for the pursuit of Howard after he refused to stop.

RESPONDENTS' REASONS FOR DENYING THE WRIT

Petitioners' fact-bound claim that the Eighth Circuit incorrectly decided this case is plainly incorrect. The decision below is a correct application of clearly-established law of the Supreme Court. Although Petitioners allege a conflict among the circuits, they fail to direct this Court to any relevant cases representing such a split among the lower courts. In fact, the Eighth Circuit opinion

follows this Court's decision in *County of Sacramento v. Lewis*, 578 U.S. 833 118 S.Ct. 1708 (1998), and there is no split among the Circuits in regard to the application of the "shocks the conscience" standard in high speed pursuit cases.

A. Petitioners' claim that a "deliberate indifference" standard should apply in police pursuits is in direct violation of the test articulated by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

In *County of Sacramento v. Lewis*, the Supreme Court resolved the conflict among the circuits over the standard of culpability for officers in pursuit cases in holding that high speed police chases culminating in death or injury to a passenger or bystander are governed by the substantive due process "shocks-the-conscience" test. The Court found that the task in determining the level of culpability in high speed pursuit cases is whether the conduct "is so egregious, so outrageous, that it may be fairly said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8. Specifically, the Supreme Court held that "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." 523 U.S. 833, 836. The *Lewis* Court specifically rejected the lower fault standard of "deliberate indifference". *Id.* at 852. The Supreme Court restated its holding a second time in the *Lewis* opinion: "we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not

give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854.

Petitioners' argument that the "worsen legal plight" standard of the *Lewis* Court requires a different result is faulty reasoning that not only produces a standard that eviscerates the holding in *Lewis*, but fails to recognize the Supreme Court's other bases for its holding: its historical reluctance "to expand the concept of substantive due process," 523 U.S. at 842; its doubt whether "it makes sense to speak of indifference as deliberate in the case of sudden pursuit," 523 U.S. at 851; its recognition that police officers confronting high-speed lawlessness are "subject to countervailing [law] enforcement considerations," 523 U.S. at 855; its concerns that any standard less than intent-to-harm "might cause suspects to flee more often, increasing accidents of the kind which occurred here," 523 U.S. at 858 (Kennedy, J., concurring); and, the belief of at least some Justices that the question of police officer liability during high-speed pursuits should be decided by the elected branches of government, 523 U.S. at 64-65, (Scalia, J., concurring).

In the instant case, the Eighth Circuit Court of Appeals specifically followed *Lewis* by requiring that Petitioners establish conscience-shocking conduct in a police pursuit and further establish a purpose to cause harm unrelated to the legitimate object of arrest. *Slusarchuk v. Hoff*, 346 F.3d 1178, 1182 (8th Cir. 2003). The Eighth Circuit, following the requirements laid out by the Supreme Court in *Lewis*, rejected Petitioners' argument that the deliberate indifference standard might apply and further rejected Petitioners' contention that Respondent officers did not have probable cause for stopping the fleeing Howard. The Eighth Circuit found no objective

evidence of any kind showing a purpose to cause harm unrelated to the legitimate object of arrest. *Id.* at 1183.

The Eighth Circuit, in rejecting Petitioners' argument that the officers were not entitled to qualified immunity because there was "an intent to worsen legal plight" when they attempted to stop Howard, recognized that such a broad reading would eviscerate the "intent to harm" standard the Supreme Court had adopted. The Eighth Circuit construed the "worsen legal plight" language "as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm." *Slusarchuk*, 346 F.3d at 1183. The Eighth Circuit's opinion shows that the Court carefully considered, and specifically followed, the guide posts laid out by the Supreme Court in *Lewis* regarding high speed police pursuits.

B. Petitioners fail to identify any conflict among the lower courts on the same matter that would justify the granting of the Petition.

Although Petitioners assert that this Court needs to resolve a split among the circuits with regard to the application of the intent to harm/worsen legal plight standard, Petitioners identify no such split in the circuits. Since *Lewis*, all circuits that have examined the issue have applied the intent-to-harm standard in high speed police pursuit cases without regard to such limiting factors as: the length of pursuit; the officer's training experience; the severity of the suspect's misconduct; the decision to initiate the pursuit; or, the perceived dangers to the public in continuing the pursuit. *See Trigalet v. City of Tulsa*, 239

F.3d 1150, 1155 (10th Cir. 2001); *Davis v. Township of Hillside*, 190 F.3d 167, 170 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Onossian v. Block*, 175 F.3d 1169, 1171-72 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999); *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001). The decision of the Eighth Circuit below is in harmony with those circuits, its own prior decisions, and the holding in *Lewis*.

In *Davis v. Township of Hillside*, the plaintiff alleged that, during a high speed pursuit, the defendant officers rammed the pursued vehicle with the patrol car, subsequently injuring the plaintiff, a pedestrian bystander. The Third Circuit rejected plaintiff's attempt to distinguish *Lewis* on the grounds that: (1) the officers were not acting on a report of the commission of a crime; (2) the officers willfully violated police department regulations; and, (3) the officers used deadly force on the pursued vehicle. In rejecting those contentions, the *Hillside* court stated:

> *Lewis* does not permit an inference of intent to harm simply because a chase eventuates in deliberate physical contact causing injury. Rather, it is 'conduct intended to injure in some way *unjustifiable by any governmental interest* [that] is the sort of official action most likely to rise to the conscience-shocking level.' It is not disputed that the ramming occurred in the course of the chase. That physical conduct of some sort between the pursuit and pursuing vehicles might occur in the course of a high speed chase, particularly at its conclusion, is foreseeable. It would undermine *Lewis*' premise to limit liability to conscience-shocking conduct if courts were to segment a high speed chase and examine elements in isolation from each other.

> Here then, as in *Lewis*, the officers were faced with lawless behavior – the flight from their investigation – for which they were not to blame. They had done nothing to cause Cook's high speed driving or his flaunting of their law-enforcement authority. Cook's action was instantaneous and so, by necessity, was the officers' response. Their intent was to do their job as law enforcement officers, not to cause injury.

190 F.3d at 171 (Internal citations omitted; emphasis added).

Similarly, the Ninth Circuit has rejected any attempt to narrow the interpretation of the shock-the-conscience standard as articulated in *Lewis*. In *Onossian v. Block*, 175 F.3d 1169 (9th Cir.), *cert. denied,* 528 U.S. 1004 (1999), motorists who were injured by a pursuing police officer brought a Section 1983 action. The *Onossian* court reviewed the *Lewis* standards and held that once a police officer is justified in giving chase, that justification insulated the officer from constitutional claim, irrespective of who might be harmed or killed as a consequence of the chase. 175 F.3d at 1171. In *Onossian*, the court found that there was no evidence that law enforcement ever intended to cause harm to anyone despite the serious injuries suffered by plaintiffs. The Eighth Circuit has also recognized that the "intent to harm" standard in police pursuit cases applies without regard to the severity of the suspect's misconduct. *Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001).

Petitioners' contention that Respondent officers had no basis to stop Howard because they were not faced with a "course of lawless behavior" that required immediate police action is unsupported in law. *See, Davis v. Township*

of Hillside, *supra; see also*, the following cases cited in *Lewis*, 523 U.S. at 839; *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (applied "shocks-the-conscience" standard where pursuit was initiated after officers cruising through residential neighborhood spotted suspicious activity at an intersection: an individual who appeared to be startled at the presence of officers threw a paper bag through an open window of a parked vehicle, vaulted into the front passenger seat, and the driver immediately drove away at 20 to 25 miles per hour); *Williams v. Denver City*, 99 F.3d 1009, 1015 (10th Cir. 1996) ("shocks-the-conscience" standard applicable where officer was responding to a non-emergency request by another officer to provide backup to that officer on the arrest of a car thief); *Fagin v. Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (en banc) (application of "shock-the-conscience" standard where officer attempted to initiate stop after observing motor vehicle which was not speeding but had a passenger standing up through the car's open T-top roof waving his arms and officer intended merely to warn the driver about the passenger's behavior); *Temkin v. Fredrick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) (application of "shock the conscience" standard where deputy sheriff initiated chase with lights and siren after observing a car spinning its wheels leaving a gas station). A review of these cases establishes that law enforcement officers are not required to be confronted with a "course of lawless behavior" before they can initiate police action. Respondents' police action in the present case, based upon articulated suspicions, and indeed, probable cause, simply cannot shock the conscience of contemporary society.

Petitioners rely heavily upon *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986). That reliance is misplaced. *Checki*, a pre-*Lewis* case, is factually and legally distinguishable from the instant case. Checki, who was a passenger in a private vehicle, brought a claim against police officers who had intentionally exposed him to severe and physical mental harm. The police officers were in plain clothes in an unmarked car and tailgating Checki's vehicle. Checki, who did not know they were police officers, and the driver of his law-abiding vehicle, who had committed no violations of any kind, were then subjected to a high speed chase by the officers for 20 miles before the officers put on red lights and a siren to indicate they were police officers. In *Checki*, there was no claim of any basis to perform an initial stop on the Checki vehicle and there was *intentional misuse* of the officers' vehicle. *County of Sacramento v. Lewis*, 523 U.S. at 854 n.13, 118 S.Ct. 1708. In contrast, in this case, uniformed officers, known as such to Howard, had articulable suspicion to initiate an investigatory stop and probable cause once Howard decided to flee from uniformed officers in a marked squad car.

The case most apposite to the instant case is *Davis v. Township of Hillside*. In that case, New Jersey police officers observed a vehicle "stopped in a traffic lane at a stop sign for what the officers considered an unusually long time. Noting also damage to the car's rear end, the officers decided to investigate . . . " *Hillside*, 190 F.3d at 169. As the officers moved toward the vehicle, it pulled away and a high speed pursuit ensued. *Id.* The *Hillside* court, in rejecting a substantive due process claim, stated "[i]n this case, the officers' suspicions were raised by Cook's unusually long stop at the intersection and rear end damage to the car. Nothing in *Lewis* suggests that courts

are free to second guess a police officer's decision to initiate pursuit of a suspect so long as the officers were acting 'in the service of a legitimate governmental objective,' here, to apprehend one fleeing the police officers' legitimate investigation of suspicious behavior." *Id.* at 170. As the *Hillside* court stated, "the critical factor in determining whether Fourteenth Amendment liability for a high speed chase may be imposed is whether the officer's conduct can be found to shock the conscience, for which the evidence must show intent to harm the suspect physically." The *Hillside* case was cited approvingly by the Eighth Circuit in *Helseth v. Burch*, 258 F.3d at 872.

Respondent officers had substantially more reason to conduct a stop than did the officers in *Hillside*. Respondent officers were investigating a suspicious vehicle when the driver, instead of stopping, feloniously fled from them and caused the grievous injuries suffered by Petitioners. There simply is a complete lack of any evidence that Officers Hoff and Faust had any intent to harm Howard physically, worsen Howard's legal plight in a fashion unrelated to a legitimate government interest, or engage in any conduct that can be deemed conscience-shocking. Because Respondents were engaged in a legitimate governmental objective, Petitioners cannot state a substantive due process violation.

CONCLUSION

For the foregoing reasons, Petitioners' Petition for Writ of Certiorari should be denied.

Dated: March 10, 2004

Respectfully submitted,

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